WONG BAN CHONG v. PP

COURT OF APPEAL, PUTRAJAYA
MOHTARUDIN BAKI JCA
ZAKARIA SAM JCA
ABDUL RAHMAN SEBLI JCA
[CRIMINAL APPEAL NO: 45B-54-07-2012]
11 DECEMBER 2014

CRIMINAL PROCEDURE: *Accused – Unsound mind – Convicted for murder and sentenced to death – Accused suspected to be of unsound mind – Procedure to be followed – Whether Judicial Commissioner complied with procedure under ss. 342 and 343 of Criminal Procedure Code – Whether failure to comply curable under s. 422 – Whether trial was proper*

The appellant was convicted by the High Court for the murder of his ex-wife under s. 302 of the Penal Code ('the Code') and for causing grievous hurt to another person under s. 326 of the same Code, which were committed in the same transaction. He was sentenced to death for the first charge, and eight years imprisonment from the date of his arrest for the second charge. His defence of private defence under s. 96 of the Code was rejected by the Judicial Commissioner ('JC'). The appellant appealed against conviction and sentence, raising the issue of the procedure that should have been followed when an accused was suspected to be of unsound mind and consequently incapable of making his defence. The JC had, prior to convicting and sentencing the accused, allowed the application for the appellant to be sent for a psychiatric examination under s. 342 of the Criminal Procedure Code ('CPC') but without specifying the remand period and later proceeded to trial without any record that the medical director had certified the soundness of mind of the appellant, as required under s. 343 of the CPC.

Held (setting aside conviction and sentence, and ordering for retrial before another judge)
Per Abdul Rahman Sebli JCA delivering the judgment for the court:

(1) The JC should have waited for the psychiatrist report issued by the medical director to certify whether or not the accused was of sound mind and capable of making his defence before proceeding to trial. In the absence of the certification, it was wrong for the JC to proceed with the trial, let alone convict the appellant of the offences charged. (para 7)

(2) Making a finding as to the mental state of the accused is a mandatory requirement imposed on the trial judge or Magistrate under s. 343(2) of the CPC, failing which would render the trial a nullity and not a mere irregularity curable under s. 422 of the CPC. (para 13)

Bahasa Malaysia *Translation Of Headnotes*

Perayu telah disabitkan oleh Mahkamah Tinggi atas kesalahan membunuh bekas isterinya di bawah s. 302 Kanun Keseksaan ('Kanun') dan menyebabkan kecederaan parah kepada seorang lagi di bawah s. 326 Kanun yang sama, yang dilakukan dalam transaksi yang sama. Perayu telah dijatuhkan hukuman mati untuk pertuduhan pertama dan penjara selama lapan tahun dari tarikh tangkapan untuk pertuduhan kedua. Pembelaan yang dikemukakan oleh perayu, iaitu pembelaan diri di bawah s. 96 Kanun tersebut telah ditolak oleh Pesuruhjaya Kehakiman ('PK'). Perayu telah merayu terhadap sabitan dan hukuman tersebut dengan membangkitkan isu prosedur yang sepatutnya diikuti apabila seorang tertuduh disyaki tidak waras dan oleh itu tidak berupaya untuk membuat pembelaan. Sebelum menyabitkan kesalahan dan menjatuhkan hukuman ke atas perayu, PK telah membenarkan permohonan untuk menghantar perayu untuk melalui pemeriksaan psikiatri di bawah s. 342 Kanun Tatacara Jenayah ('KTJ') tetapi beliau tidak menetapkan tempoh reman tersebut dan kemudiannya telah meneruskan dengan perbicaraan walaupun tiada sebarang rekod bahawa pengarah perubatan telah mengesahkan kewarasan perayu, seperti yang dikehendaki di bawah s. 343 KPJ.

Diputuskan (mengenepikan sabitan dan hukuman; mengarahkan perbicaraan semula di hadapan hakim lain)
Oleh Abdul Rahman Sebli HMR menyampaikan penghakiman mahkamah:

(1) PK sepatutnya menunggu sehingga laporan psikiatri dikeluarkan oleh pengarah perubatan untuk mengesahkan sama ada perayu waras dan berupaya untuk membuat pembelaan sebelum meneruskan dengan perbicaraan. Tanpa pengesahan tersebut, adalah salah bagi PK meneruskan dengan perbicaraan, inikan pula menyabitkan perayu atas kesalahan yang dituduh terhadapnya.

(2) Membuat dapatan ke atas keadaan mental seorang tertuduh adalah kehendak mandatori yang dipertanggungjawabkan kepada hakim bicara atau Majistret di bawah s. 343(2) KTJ. Kegagalan hakim bicara atau Majistret untuk berbuat demikian akan membatalkan perbicaraan tersebut dan bukan sekadar ketidakaturan yang boleh dibetulkan di bawah s. 422 KTJ.

Legislation referred to:
Criminal Procedure Code, ss. 342(2), (3), (4), 343(1), (2), 348, 422
Penal Code, ss. 84, 96, 302, 326

For the appellant - Afifudin Ahmad Hafifi; M/s Salehuddin Saidin & Assocs
For the respondent - Mohd Fairuz Johari; DPP

[Appeal from High Court, Alor Setar; Case No: 45B-54-09-2012]

Reported by Lyana Shohaimay

JUDGMENT

Abdul Rahman Sebli JCA:

[1] The appellant was convicted by the High Court of Alor Setar for the murder of his ex-wife under s. 302 of the Penal Code and of causing grevous hurt to another person under s. 326 of the same Code. The offences were committed in the same transaction. For the first charge the appellant was sentenced to death while for the second charge he was sentenced to eight years imprisonment with effect from the date of his arrest. His defence which the learned Judicial Commissioner ('the learned JC') rejected was the right of private defence under s. 96 of the Penal Code.

[2] This appeal concerns the duty of the court where the accused is suspected to be of unsound mind and consequently incapable of making his defence. We reproduce below the relevant provisions of Chapter XXXIII of the Criminal Procedure Code ('the CPC') which prescribes the procedure to be followed:

342. Procedure where accused is suspected to be of unsound mind

(1) When a Judge or a Magistrate holding a trial has reason to suspect that the accused person is of unsound mind and consequently incapable of making his defence he shall in the first instance investigate the fact of such unsoundness.

(2) At the investigation it shall not be necessary for the accused person to be present and the Judge or Magistrate may receive as evidence a certificate in writing signed by a Medical Officer to the effect that the accused person is in his opinion of unsound mind or is a proper person to be detained for observation in a psychiatric hospital, or the Judge or Magistrate may, if he sees fit, take oral evidence from the Medical Officer on the state of mind of the accused person.

(3) If not satisfied that the person is capable of making his defence, the Judge or Magistrate shall postpone the trial and shall remand that person for a period not exceeding one month to be detained for observation in any psychiatric hospital in Malaysia.

(4) The Medical Director of the said psychiatric hospital shall keep that person under observation during the period of his remand and before the expiry of that period shall certify under his hand to the Court his opinion as to the state of mind of that person, and if he is unable within the period to form any definite conclusion, shall so certify to the Court and shall ask for a further remand. Such remand may extend to a period of two months.

343. Certificate of Medical Director

(1) If the Medical Director shall certify that the accused person is of sound mind and capable of making his defence the Judge or Magistrate shall proceed with the trial.

A (2) If the Medical Director shall certify that that person is of unsound mind and incapable of making his defence the Court shall, if satisfied of the fact, find accordingly, and thereupon the trial shall be postponed.

(3) The certificate of the Medical Director shall be receivable as
B evidence under this section.

(4) If the person is certified to be of unsound mind and incapable of making his defence it shall not be necessary for him to be present in Court during proceedings under this section.

[3] Thus the procedure is that where the trial judge or Magistrate has
C reason to suspect that the accused is of unsound mind and consequently incapable of making his defence, he must investigate that fact and if not satisfied that the accused is capable of making his defence, to order the accused to be detained at any psychiatric hospital for a period not exceeding one month for psychiatric observation. It needs no emphasis that the
D suspicion must be a reasonable suspicion and not just any suspicion.

[4] At the end of the observation period of one month or any extended period, if the trial judge or Magistrate is satisfied with the Medical Director's certification that the accused is of unsound mind and incapable of making his defence, the trial must be postponed. The Medical Director's certification
E must be accepted at its face value unless contradicted by another expert, in which case the trial judge or Magistrate will decide accordingly.

[5] In the present case the notes of proceeding shows that on 22 October 2012 when the appellant was first produced before the learned JC, counsel applied for the appellant to be sent for psychiatric examination. The
F application was granted by the learned JC whereupon the appellant was ordered to be detained at Hospital Bahagia Tanjung Rambutan for psychiatric observation but without specifying the period of remand, contrary to s. 342(3) which stipulates that the period of remand shall not exceed one month.

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[6] The case was then adjourned to 25 November 2012 and subsequently to 21 April 2013 for trial, a period of more than one month after the remand order was made. There is no record to show that the extended remand period was made pursuant to s. 342(4). Likewise when the trial commenced on 21 April 2013 there is no record to show that the Medical Director had
H certified pursuant to s. 343(1) that the appellant was of sound mind and capable of making his defence. Despite that the trial proceeded to its conclusion on 5 August 2013 whereupon the appellant was found guilty of both charges.

I **[7]** The fact that the learned JC made the remand order on 22 October 2012 shows that he was not satisfied that the appellant was capable of making his defence due to unsoundness of mind. What the learned JC should have done as the next step after making the remand order was to wait for the

psychiatrist report issued by the Medical Director pursuant to s. 343(1) of the CPC. It was only when the appellant had been certified to be of sound mind and capable of making his defence that the trial should have proceeded. In the absence of such certification it was wrong for the learned JC to have proceeded with the trial, let alone to have convicted the appellant of the offences charged.

[8] In the context of s. 342 of the CPC unsoundness of mind refers to the accused's mental capacity to make his defence. It has nothing to do with the defence of unsoundness of mind under s. 84 of the Penal Code. That is a matter to be decided at the conclusion of the trial, if the defence of insanity is raised. The court's only concern under the procedure prescribed by s. 342 is to determine whether the accused is mentally fit to stand trial.

[9] There are therefore two situations under Chapter XXXIII of the CPC where unsoundness of mind becomes an issue, one at any time during the course of the trial (s. 342) and the other at the conclusion of the trial where the defence of insanity is raised and proved (s. 348).

[10] The policy reason behind s. 343(2) of the CPC is not hard to understand. If the accused is unfit to stand trial due to unsoundness of mind, he is not expected to be able to follow the proceeding intelligently or to give proper instructions to his counsel. The trial cannot be considered fair when the accused is unable to understand the nature of the case that is being made out against him. This is so even where he is represented by counsel.

[11] It is true that at the trial neither the DPP nor counsel who appeared for the appellant raised the issue of the appellant's capability to make his defence but in our view it was the duty of the learned JC to ascertain this fact, having made the order of remand for psychiatric observation pursuant to s. 342(3). By proceeding with the trial without ascertaining the result of the observation, the learned JC had contravened the requirements of ss. 342 and 343 of the CPC.

[12] The question is whether such contravention is a mere irregularity curable under s. 422 of the CPC as contended by the learned DPP. He urged upon us to uphold the decision as there is sufficient evidence to support the convictions. In our view the merits of the case are irrelevant as the trial should not have proceeded in the first place.

[13] The requirement of s. 343(2) of the CPC which imposes on the trial judge or Magistrate the duty to make a finding as to the mental state of the accused and to postpone the trial if the accused is incapable of making his defence is a mandatory requirement and failure to comply will render the trial a nullity. It is not a mere irregularity curable under s. 422 of the CPC. It was for this reason that we set aside the convictions and sentence and ordered for a retrial before another judge.